Chapter 13 eligibility
§ 109(e)
actual and apparent authority

In re Grayson, Case No. 301-30932-elp13

07/07/03 J. King denying motion to dismiss unpub

District court denied motion to dismiss after evidentiary hearing on whether debtor's attorney had authority to sign stipulated order making the debtor liable for receivership fees and expenses. The court concluded that debtor's attorney did not have actual or apparent authority and thus that debtor had noncontingent, liquidated, unsecured debt below the § 109(e) limit on the petition date. The court granted leave to the moving party to file another motion to dismiss raising additional eligibility issues.

P03-5(7)

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UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF OREGON

In Re: BARCLAY LLOYD GRAYSON, Debtor.	No. 301-30932-elp13 OPINION

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KING, Judge:

On February 27, 2003, I filed an opinion in which I adopted the Findings and Conclusion of the Bankruptcy Court concerning the Department of Labor's ("DOL") Motion to Dismiss (#77). The DOL contended that the debtor, Barclay Grayson, was ineligible for Chapter 13 relief because he owed more than the § 109(e) limit of $269,250 of noncontingent, liquidated, unsecured debt at the time of filing his petition. According to the DOL, Grayson's liability for the receivership's costs and fees put him over the limit. I adopted the Bankruptcy Court's findings that most of Grayson's arguments for falling under the limit were not persuasive.

One issue required an evidentiary hearing before I could make a final ruling on the motion: the extent of the authority of Grayson's attorney. Grayson contended that his attorney did not have the authority to stipulate to Grayson's liability for the receivership's costs and fees. After an evidentiary hearing, I conclude that Grayson's attorney did not have the apparent authority to execute the Stipulations binding Grayson. Thus, I conclude that Grayson is eligible for Chapter 13 relief and deny the Motion to Dismiss with the caveat that the DOL has leave to file another Motion to Dismiss on any grounds set aside by the Bankruptcy Court pending the resolution of this issue.

FACTS

Norman Sepenuk represented Jeffrey Grayson in August 2000 during an investigation of Capital Consultants, LLC ("CCL"), for fraud and ERISA violations. The Securities and Exchange Commission ("SEC") subpoenaed both Jeffrey and Barclay Grayson. Sepenuk thought that Barclay Grayson[1] needed his own attorney and suggested that he retain Steven Ungar. Grayson retained Ungar on August 15, 2000, to represent him on issues raised in investigations by the SEC, the DOL, and the United States Attorney's Office.

On September 20, 2000, Sepenuk, Ungar, and CCL's attorneys went to a meeting

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[1] The remaining references to "Grayson" are to Barclay Grayson.

with between six and ten government attorneys. Grayson was not at the meeting but knew that Ungar would attend to represent him. Grayson also did not know that the DOL would attend the meeting until after it was held. Sepenuk, Ungar, and CCL's attorneys had been working towards a settlement which would have kept Jeffrey Grayson in charge of CCL. They still believed that they could delay the appointment of a receiver.

At the meeting, the attorneys learned that the government had other plans. The government had drafted Complaints and was prepared to put CCL out of business unless the parties immediately stipulated to a temporary restraining order, asset freeze, and appointment of a receiver. Ungar was also aware that the ongoing investigation might result in criminal charges against Grayson.

The attorneys negotiated many issues and reviewed numerous drafts during the chaotic events of September 20 and 21. The Stipulation in the SEC action, but not in the DOL action, also had the attorneys liable for the fees and costs of the receiver. No one intended for the attorneys to bear this liability. The attorneys relied on the government attorneys' statement that "it will all be cleaned up later."

Ungar does not recall whether he ever spoke to Grayson about the term in the DOL Stipulation which provides that Grayson is personally liable for the receiver's costs and fees.

On September 20, 2000, Grayson learned from his father that the meeting went "horribly wrong" and that his father told the attorneys to place CCL in receivership. Grayson also spoke to Ungar, who told him about the receivership and the temporary freeze on his assets but who said nothing about Grayson being liable for the receivership fees and costs. Grayson knew that Ungar would be executing documents on his behalf. If Grayson knew about the financial liability, he would not have agreed to the Stipulations. Grayson never gave Ungar authority to agree to Grayson's liability for the receivership fees and costs. Grayson did not have the financial ability to pay the receivership fees and costs.

DISCUSSION

I find Grayson's testimony to be very credible. Thus, I conclude that Ungar did not have actual authority to execute the Stipulations. The issue turns, then, on whether Ungar had apparent authority to do so.

Apparent authority is created by conduct of the principal, which when reasonably interpreted caused a third party to believe that the principal has authorized the agent to act on the principal's behalf in the matter, and the third party relies on the belief. Badger v. Paulson Investment Co., Inc., 311 Or. 14, 24, 803 P.2d 1178 (1991). Badger cites the Restatement (Second) of Agency § 27 which elaborates that apparent authority is created "by written or spoken words or any other conduct of the principal." Id. at n.8. Moreover, liability based on apparent authority may be imposed even if the principal expressly forbids the conduct in question. Id. at 26. In the context at issue here, the authority to negotiate with the opposing party does not by itself imply the authority to enter into a binding settlement. Kaiser Foundation Health Plan v. Doe, 136 Or. App. 566, 574, 903 P.2d 375 (1995), modified on other grounds, 138 Or.App. 428, 908 P.2d 850 (1996).

The DOL relies on Kaiser. Doe and her attorney attended a mediation concerning Doe's complaint of sexual harassment at her employer, Kaiser. Doe had no contact at the mediation with anyone except her attorney and the mediator. At dinner time, Doe authorized her attorney to accept the last settlement offer but to wait a few hours before notifying Kaiser. Doe then left. The attorneys memorialized in writing the terms that constituted the offer. Doe's attorney contacted Kaiser's attorney later in the evening to clarify the confidentiality provision and the allocation of settlement money for tax purposes. He then told Kaiser's attorney that Doe accepted the terms. A few days later, Doe informed her attorney that she rescinded the verbal agreement made with Kaiser. The appellate court held that the oral agreement was enforceable, even though Doe contended that she was unaware of the arbitration provision. It reasoned that Doe gave her attorney both actual and apparent authority to accept the settlement offer. Id. at 572-73. The apparent authority was based on Doe allowing her attorney to do all negotiating and be the conduit for all offers and counteroffers.

Grayson cites a few cases which are instructive. In Fennell v. TLB Kent Company, 865 F.2d 498 (2nd Cir. 1989), Fennell's attorney settled a discrimination case during a telephone conversation. Fennell later disavowed the settlement and told the court that he had told his attorney that he would settle only for a higher amount. The appellate court set the settlement aside, holding that the attorney did not have apparent authority to settle. The court reasoned that Fennell made no manifestations to defense counsel that his attorney was authorized to settle the case, even though Fennell knew that the attorneys were discussing settlement. Id. at 502.

In Walson v. Walson, 556 S.E.2d 53 (Va. Ct. App. 2001), the attorneys of a divorcing couple and the husband met to negotiate a settlement agreement. The wife chose not to attend but spoke by telephone with her attorney at least ten times during the meeting. After four hours of negotiations, the wife's attorney did not return to the conference room from his phone call to the wife because the two had a dispute on the telephone. The next morning, the wife sent her attorney an email which he believed authorized him to settle the case. The attorney drafted and executed an agreement which was accepted by the husband. The next day, the wife met with her attorney to review a draft agreement but found out that the agreement was already executed. The appellate court set aside the agreement, finding that her attorney did not have apparent authority. Id. at 57. The court noted that the wife had no direct communications to either her husband or his attorney that gave authority to her attorney to settle the case as opposed to negotiating it. Under the circumstances, the court believed that the wife, and not her attorney, was clearly in charge of the negotiations, particularly because of the attorney's constant telephone calls to her. The court was also concerned about the attorney's failure to return to the negotiation the night before without explanation. Under the circumstances, reliance on the attorney's authority to execute the settlement was not reasonably justified. Id.

In Grayson's situation, he did not directly communicate to the government any authority given to Ungar to execute the Stipulations. The evidence shows that the Graysons' attorneys did not expect to attend a meeting and be faced with a demand to immediately stipulate to provisions to shut down CCL. The government attorneys had draft Complaints ready to be filed, but had not shared them with the Graysons' attorneys prior to their arrival at the conference. This shows that the government wished to use the element of surprise to achieve execution of the Stipulations. Moreover, the government attorneys would have understood from past experience the potential size of the financial liability contained in the Stipulations. There is no evidence that either Sepenuk or Ungar had such an understanding. I conclude that a reasonable person would want evidence of express authority before accepting the signature of an attorney to bind his client to this type of liability. Consequently, I must conclude that Ungar did not have the apparent authority to execute the Stipulations.

I distinguish Kaiser because in it the reneging party, Doe, attended the mediation with the hopes of entering into a settlement agreement, which is what her attorney did on her behalf. The Graysons' attorneys attended the conference with the SEC and DOL with the hopes of holding off a receivership. The opposite occurred.

Grayson seeks the limited remedy of removing any provision in the SEC Stipulated Order and the DOL Stipulated Order relating to his personal liability for receivership fees and expenses. This entails: (1) removing his name from paragraph XI in the SEC Stipulated Order; and (2) reforming the DOL Stipulated Order by removing primary liability for him with respect to paragraph 11 and removing his name from paragraph 12. I grant the request. [2]

This means that Grayson's noncontingent, liquidated, unsecured debt at the time of filing his petition was below the § 109(e) limit. Thus, his bankruptcy petition may proceed.

CONCLUSION

The Department of Labor's Motion to Dismiss (#77) is denied. The DOL has leave

[2] I want to emphasize that this opinion resolves a legal question related to Grayson's bankruptcy petition. On March 8, 2002, I approved a settlement of claims between Grayson and CCL and its investors in which Grayson's liability for the Receiver's costs and fees was satisfied.

to file another Motion to Dismiss on any grounds set aside by the Bankruptcy Court pending the resolution of this issue.

DATED this 2nd day of July, 2003.

GARR M. KING
United States District Judge